No. 122.

M. of Ward for P. E.

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Supreme Court of the United States

OCTOBER TERM, A. D. 1901.

CLEMENT STUDEBAKER,
Plaintiff in Error,
vs.
JOHN PERRY, as Receiver of The National Bank of Kansas City,
Defendant in Error.

No. 122.

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

HUGH C. WARD,
for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1901.

CLEMENT STUDEBAKER,
Plaintiff in Error,
vs.
JOHN PERRY, as Receiver of The National Bank of Kansas City,
Defendant in Error.

No. 122.

STATEMENT OF CASE.

This suit was commenced the 9th day of November, 1899, in the Circuit Court of the United States in and for the Northern District of Illinois, by John Perry, as Receiver of the National Bank of Kansas City to recover of Clement Studebaker, a shareholder therein, the sum of thirteen hundred and twenty-three ($1323.00) dollars, with interest thereon from and after the 25th day of March, 1899, at the rate of six per cent (6) per annum, which plaintiff alleged in his declaration was defendant's share of an assessment and requisition of seven ($7.00) dollars, made the 25th day of February, 1899, by the Comptroller of the Currency, under the provisions of Sections 5151 and 5234 of the Revised Statutes of the United States, 1875, on each and every share of the capital stock of that bank. Plaintiff further alleged in his declaration that on the 11th day of February, 1896, the Comptroller of the Currency made an assessment and requisition of sixteen ($16.00) dollars per share on each and every share of the capital stock thereof, including the one hundred and eighty-nine (189) shares of the capital stock owned and held by the defendant, and that defendant in due time paid his portion of

such assessment and requisition. (Rec., 4-5). To plaintiff's declaration, defendant in due time and on the 16th day of December, 1899, demurred, the ground of such demurrer being that said declaration and the matters and things therein contained, in matter and form as set forth, were not sufficient in law for plaintiff to maintain his action against defendant. (Rec., 7).

Defendant's contention in the trial court on this demurrer, as well as in the Circuit Court of Appeals for the Seventh Circuit, was, and is here, that the Comptroller of the Currency was not authorized by the terms of Sections 5151 and 5234, *supra*, to make the second assessment and requisition of February the 25th, 1899, upon the shareholders of such insolvent national bank.

Afterwards, to-wit: On the 17th day of February, 1899, the trial court overruled defendant's demurrer, and defendant refusing to further plead, judgment was rendered against defendant in the sum of fifteen hundred four and 16-100 ($1504.16) dollars. (Rec , 7-8). Thereupon defendant sued out a writ of error, taking the question involved in this case to the Circuit Court of Appeals for the Seventh Circuit, for review, where on the 23rd day of June, 1900, the decision of the trial court was affirmed. (Rec., 8-12, 16).

This being a case in which the judgment of said Circuit Court of Appeals is not made final by the terms of the Circuit Court of Appeals Act of March 3, 1891, and the amount in controversy exceeding one thousand dollars, besides costs, plaintiff in error has brought this case here from said Circuit Court of Appeals by writ of error for review by this Court.

ASSIGNMENT OF ERRORS.

1. The trial court erred in overruling defendant's demurrer to plaintiff's declaration, which demurrer in words and figures, was as follows, to-wit:

"And the said defendant, Clement Studebaker, by Hugh C. Ward and Daniel Rich, his attorneys, comes and defends the wrong and injury, when, etc., and says that the plaintiff's declaration, and the matters and things therein contained in manner and form as the same are above set forth, are not sufficient in law for

him, the said plaintiff, to maintain his aforesaid action against this defendant, and that he, the said defendant, is not bound by law to answer the same, and this he is ready to verify ; wherefore, for want of sufficient declaration in this behalf the said defendant prays judgment, etc."

2. The trial court erred in holding plaintiff's declaration sufficient in law, and in ruling that defendant further plead to plaintiff's declaration.

3. The trial court erred in rendering a judgment against defendant upon defendant refusing to plead further, for the reason that the matters and things in plaintiff's declaration contained in manner and form as therein set forth are not sufficient in law for said plaintiff to maintain his action against this defendant.

4. The trial court erred in rendering a judgment against defendant for the reason that plaintiff's declaration, and the matters and things therein contained in manner and form as the same are set forth therein, are not sufficient in law for said plaintiff to maintain his action against this defendant, and to entitle him to a judgment against this defendant.

BRIEF OF ARGUMENT.

I.

The question, and the only question presented by this record for determination by this court, is whether the comptroller of the currency has the power under the terms of Sections 5151 and 5234, R. S. U. S. 1875, to make a second assessment upon shareholders of an insolvent national bank to pay its debts and enforce the payment thereof. In other words, whether the comptroller of the currency is authorized by these sections to enforce by several suits the individual liability of a shareholder of an insolvent national bank to pay the debts of such bank. The question is not whether the comptroller of the currency ought to have such power, but rather whether he has such power under the law as it now reads and has read since 1864.

This question was first answered in the affirmative, June 28th, 1899, in *Aldrich v. Yates*, 95 Fed. Rep., 78, by Judge Evans of the Federal Court of Kentucky, and in the negative October 19th,

1899, in *Deweese v. Smith*, 97 Fed. Rep., 309, by Judge Philips of the Federal Court of Missouri in a well considered opinion, and again in the affirmative, June 23rd, 1900, in *Studebaker v. Perry, Receiver*, 102 Fed. Rep., 947, by the Circuit Court of Appeals for the seventh circuit, and again in the affirmative, February 25th, 1900, in *Deweese v. Smith*, 106 Fed. Rep., 438, by the Circuit Court of Appeals for the eighth circuit. This court has never passed upon the question here presented and could not have done so prior to these last mentioned decisions for the simple reason that no comptroller of the currency, until the year 1897 or 1898, ever claimed the right or ever attempted to make a second assessment as was made in this case.

The decisions in *Aldrich v. Yates* and *Studebaker v. Perry Receiver*, against our contention here, are due to an entire lack of conception or appreciation of the nature and character of a national bank shareholder's individual liability, and the decision in *Deweese v. Smith*, 106 Fed. Rep., 438, adverse to our contention here, is due to an entire misconception of such liability.

The correct answer to this question involves a consideration of the nature and character of a national bank shareholder's i ability and further a careful consideration of the language of sections 5151 and 5234, R. S. U. S., which create and fix such liability.

When the nature and character of such liability and the meaning of sections 5151 and 5234 are understood, a correct answer to the question here presented at once becomes easy.

II.

The Individual Liability of National Bank Shareholders is Contractual.

That the individual liability of national bank shareholders is contractual may now be regarded as settled by the decisions of this Court.

In *United States v. Knox*, 102 U. S., 424, this court said:

"By the common law the individual property of the stockholders was not liable for the debts of the corporation under any

circumstances. Here the liability exists by virtue of the statute and the assent of the corporators to its provisions, given by the contract which they entered into with congress in accepting the charter.

"With respect to the character of that liability, it is entirely clear from the language employed in creating it, that it is several and cannot be made joint, and that the shareholders were not intended to be put in the relation of guarantors or sureties, 'one for another,' as to the *amount* which each might be required to pay."

In *Richmond v. Irons*, 121 U. S., 55, this court said :

"Under that act" (meaning the national bank act) "the individual liability of the stockholders is an essential element in the contract by which the stockholders become members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt and engagement of the bank itself as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising under these obligations and promises should not have the same force and effect and be as binding in all respects as any other contracts of the individual stockholders. We hold, therefore, that the obligation of the stockholder survives as against his personal representatives."

Again, at page 48, it is said :

"Section 5151 imposes upon the shareholders of every national bank association an individual responsibility for all its contracts, debts and engagements, and the terms in which the obligation is created are unconditional and unqualified, except that the liability shall be equal and ratable as among the shareholders."

In *Concord First National Bank v. Hawkins*, 174 U. S., 372, this Court, in speaking of the obligation of national bank shareholders, said :

"Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation."

To the same effect is *Whitman v. Bank*, 176 U. S., 559.

The individual liability of stockholders in corporations generally is a contract liability.

Cook on Corporations at section 223, says :

"The courts are nearly unanimous in holding that where by statute the stockholders in a corporation instead of being relieved entirely from liability to corporate creditors are only partially relieved therefrom, the additional liability is a contract liability and will be enforced by the courts of any state. In other words, the ordinary statutory liability of stockholders is a contract liability and is generally held to be such by the courts of all the states."

III.

The Contract of a National Bank Shareholder is that he Shall be Individually Responsible Equally and Ratably, for the Contracts, Debts and Engagements of such Bank to the Extent of the Amount of His Stock Therein and that if Necessary to Enforce Such Contract Liability to Pay the Debts of His Bank, he will Pay, on Demand of the Comptroller of the Currency the Par Value of his Stock. Such Contract Liability being Single and Indivisible, only one Assessment and Suit to Enforce the Same is Authorized by Law.

(*a*) It being established by the decisions of this Court that the individual liability of shareholders of a national bank is one of contract, it now becomes important to ascertain and determine what their contract or agreement is. This must be done by looking to the words of sections 5151 and 5234, of the Revised Statutes of the United States, 1875, and the decisions of this Court construing them ; for it is those sections which create such contract liability and fix the terms thereof. Those sections are in words and figures as follows, to-wit :

"SECTION 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares, except that shareholders in any banking association now existing under the state laws, having not less than five millions of dollars of capital actually paid in and a surplus of twenty per centum on hand, both to be determined by the

comptroller of the currency, shall be liable only to the amount invested in their shares ; and such surplus of twenty per centum shall be kept undiminished and be in addition to the surplus provided for in this title ; and if at any time there is a deficiency in such surplus of twenty per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good ; and in case of such deficiency the comptroller of the currency may compel the association to close its business and wind up its affairs under the provisions of chapter four of this title.

SEC. 5234. On becoming satisfied, as specified in sections 5226 and 5227, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the comptroller of the currency may forthwith appoint a receiver and require of him such bond and security as he deems proper. Such receiver, under the directions of the comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it, and upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and on a like order may sell all the real estate and personal property of such association on such terms as the court shall direct ; and may, if neccessary, to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all moneys so made to the treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings."

Section 5151, *supra*, creates and fixes the liability and section 5234, *supra*, relates to the enforcement thereof.

These sections of the statute making national bank shareholders individually liable for the debts of such bank to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares, being in derogation of the common law, must be strictly construed. *Cook on Corporations*, Vol. 1, Sec. 241 ; *Knox v. U. S.*, 102 U. S., 422.

In *Carroll et al. v. Green et al.* 92 U. S., 509, this Court having under consideration the individual liability of stockholders in corporations, in recognition of this rule of construction, said :

"Individual liability is repugnant to the law of corporations, and qualifies in this case an exemption which would otherwise exist. Stockholders in such cases are liable according to the plain meaning of the terms employed by the legislature and not otherwise."

So, in *Lowry et al. v. Inman*, 46 N. Y., 119, the New York Court of Appeals, discussing the individual liability of stockholders, said:

"The operation and effect of the statute, or the liability of the stockholder, which is measured by it, cannot be extended by implication. There is no implied undertaking of the defendant as a stockholder of the bank; and there is no obligation resulting from that relation, other than such as is expressed in terms, or by necessary implication in the act of incorporation.

"The plaintiffs must bring the case within the four corners of that instrument or fail in their action."

What then is the contract liability of national bank shareholders, measured by the plain words of sections 5151 and 5234, not extended by implication? What is the plain meaning of the terms thereof?

Section 5151, R. S. U. S., is too plain for construction. The meaning of such section is clearly expressed by the words used therein.

The agreement or contract of the shareholders of every national banking association, in the language of section 5151 is that they "shall be held individually responsible, equally and not one for another, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein at the par value thereof in addition to the amount invested in such shares."

Section 5234, R. S., U. S., has been construed by this Court. But without the aid of judicial construction that portion of section 5234, R. S., U. S., *supra*, material here, clearly means that "such receiver, under the directions of the comptroller * * * may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders," according to law. Whether by a suit at law, or in equity, or both, this section does not say. This Court, however, soon after the enactment of such section, construed its language to mean that such liability must be enforced by an action at law if such liability is sought to be enforced to its full extent, and by a proceeding in equity or at law if only a part of such liability is sought to be enforced. In the same case this Court held also that it was for the comptroller to decide when it is necessary to institute such proceedings, and whether a whole or a part, and if

only a part, how much of such liability shall be collected (*Kennedy v. Gibson*, 8 Wall, 498). So, we say, if the meaning given to section 5234, R. S., U. S., by this Court was written into said section, said section would read as follows:

"Such receiver, under the directions of the comptroller, * * * may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders" at such time and in such amount as he may decide, and by a proceeding at law if the whole of such liability is sought to be enforced, and by a proceeding in equity, or at law, if only a part of such liability is sought to be enforced.

That such was the construction placed on Section 5234, *supra* in *Kennedy v. Gibson*, 8 Wall, 498, where this Court first pointed out the obligations of national bank shareholders thereunder, is made certain by this language:

"The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and if put in issue must be proved.

"The liability of the stockholders is several and not joint. The limit of their liability is the par of the stock held by each one. Where the whole amount is sought to be recovered the proceeding must be at law. Where less is required the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted. It would be attended with injurious consequences to forbid action against the stockholders until the precise amount necessary to be collected shall be formally ascertained. This would greatly protract the final settlement, and might be attended with large losses by insolvency and otherwise in the intervening time. The amount must depend in part upon the solvency of the debtors and the

validity of the claims. Time will be consumed in the application of these tests, and the results in many cases cannot be foreseen. The same remarks apply to the enforced collections from the stockholders. A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it. If too much be collected, it is provided by the statute, that any surplus which may remain after satisfying all demands against the association, shall be paid over to the stockholders. It is better they should pay more than may prove to be needed than that the evils of delay should be encountered. When contribution only is sought, all the stockholders who can be reached by the process of the court may be joined in the suit. It is no objection that there are others beyond the jurisdiction of the court who cannot for that reason be made co-defendants."

In *Casey v. Gali*, 94 U. S., 676, which was an action at law to enforce the liability of national bank shareholders to the full extent, the language used in *Kennedy v. Gibson*, *supra*, was fully approved.

In *National Bank v. Case*, 99 U. S., 628, which was a bill in equity, brought by Frank Case, receiver of the Cresent City Bank of New Orleans, against the stockholders of that institution to collect 70 per cent of the par value of the capital stock, owned by them, this Court said :

"Former decisions of this court have ruled that the determination of the comptroller of the currency is conclusive of the extent to which liability of stockholders of insolvent banks may be enforced in suits against such stockholders."

In *United States v. Knox*, 102 U. S., 422, this Court said :

"In the process to be pursued to fix the amount of the separate liability of each of the shareholders it is necessary to ascertain : 1. The whole amount of the par value of all the stock held by all the shareholders. 2 The amount of the deficit to be paid after exhausting all the assets of the bank. 3. Then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank at its par value. There is a limitation of this liability. It cannot in the aggregate exceed the entire amount of the par value of all the stock."

In *Bushnell v. Leland*, 164 U. S., 684, which was an action at law to enforce the individual liability of a national bank share-

holder, this Court cited with approval *Kennedy v. Gibson ; Casey v. Gali, and United States v. Knox, supra.*

So it may now be regarded as settled by the decisions of this courts that the comptroller of the currency by the terms of Sections 5151 and 5234 must first decide as to the necessity of enforcing this individual liability ; the time when the same shall be enforced, whether *the whole or a part of such liability, and if only a part how much shall be collected ;* that this action on his part is indispensable whenever the individual liability of stockholders is sought to be enforced and must precede the institution of suit by the receiver ; that where the whole of such individual liability is to be enforced it must be enforced by an action at law and where a part thereof is to be enforced it may be enforced either by a proceeding at law or one in equity ; and that the decision of the comptroller is conclusive of the extent to which such liability may be enforced.

The comptroller is authorized by section 5234 to and he must decide on examination first whether it is necessary to enforce the stockholders' liability created and fixed by section 5151, that is, whether the assets of the insolvent bank are sufficient or insufficient to pay the debts of such bank ; and if insufficient, he must further decide when proceedings shall be instituted to enforce such contract liability, and, in the language of this Court in *Kennedy v. Gibson, supra*, "whether the whole, or a part, and if only a part, how much shall be collected." The comptroller's decision as to these matters being absolutely conclusive on shareholders, it follows that their agreement is to pay on demand of the comptroller the whole amount of their liability ; for they cannot question the amount demanded by him. It is true that the comptroller can demand less if he sees fit to do so, but he is under no obligation to do so any more than the holder of a demand promissory note for five thousand dollars is under obligation to demand less. The holder of such note can demand less, but it is wholly optional with him. So can the comptroller, but it is wholly optional with him too.

It is usually provided in the articles of association of corporations, or in statutes, or in stock subscription contracts that the capital stock of such corporations shall be payable in installments on call, or on demand. In such cases the agreement, or undertaking of the stockholders, is to pay their subscriptions in

installments and the authorities are agreed that the amount of such subscriptions can be collected in installments. Where, however, there is no such provision as to payment of stock subscriptions the authorities are not agreed in holding that the stockholders impliedly promise to pay the capital stock in installments on call of the board of directors. Cook on Corporation, Section 105. In New York the rule is that corporation stock subscriptions are payable absolutely and at once or as soon as the corporation is duly organized, unless the subscription contract provides for installments and calls. Cook on Corporation, Section 107; *Lake Ontario Railroad v. Mason*, 16 N. Y., 451; *Phoenix Warehousing Company v. Badger*, 67 N. Y., 294.

The authorities are agreed that stockholders are individually liable by and only the plain terms of the statute creating such liability and that their liability cannot be extended by implication. In case of individual liability of stockholders there is no implied undertaking on their part and there is no obligation resulting from that relation, other than such as is expressed in terms. *Carroll et al. v. Green et al.*, 92 U. S., 509; *Lowry v. Inman*, 46 N. Y., 119.

There being no implied promise or undertaking on the part of national bank shareholders to discharge their individual liability in installments, it can not be said that their contract is to pay such liability at such times and in such amounts as the comptroller shall fix.

Section 5234, *supra*, does not say that the receiver, under the direction of the comptroller, *can enforce only so much of the liability created by section 5151 as may be necessary to pay the debts of such bank.* It says that the *receiver, under the directions of the comptroller, may, if necessary to pay the debts of such bank, enforce the stockholders' liability created by section 5151.*

If it be necessary to enforce such liability to any extent to pay the debts of such bank, the comptroller can enforce it to its full extent, returning any surplus collected to the shareholders. And this must be so, for the reason that such shareholders have obligated themselves to pay such amount.

Section 5236 of the Revised Statutes of the United States provides that any surplus of the amount collected from the shareholders to pay the debts of such association which may

remain after satisfying all demands against such association shall be paid over to the stockholders. The enactment of this section, which follows sections 5151 and 5234, is a clear recognition of the right of the comptroller to enforce such liability to the full extent; and clearly sustains our contention that the comptroller may enforce the individual liability of the stockholders to its full extent.

In *O'Connor v. Witherby*, 111 Cal., 523 it was held that the comptroller of the currency had the right to collect the full amount of the individual liability of national bank shareholders in the event it became necessary to resort to such liability to pay such bank's debts.

This Court so construed these sections in *Kennedy v. Gibson*, *supra*, for there it was said:

"A speedy adjustment is necessary to the efficiency and utility of the law; the interests of creditors require it, and it was the obvious policy and purpose of Congress to give it. If too much be collected, it is provided by statute that any surplus which may remain after satisfying all demands against the association shall be paid over to the stockholders. It is better they should pay more than may prove to be needed than the evils of delay should be encountered."

If the comptroller is authorized by these sections to collect more of such individual liability than is needed to pay the debts of such insolvent bank, it follows, as a matter of course, that he is authorized by these sections to collect the whole of such liability. In other words, he is authorized to enforce such liability to its full extent, if it be necessary to resort to it to pay the debts of such bank. If the assets be insufficient, in the judgment of the comptroller, to pay the debts of such bank, he can demand at once the whole amount of such individual liability and enforce the payment thereof by suit. As soon as he decides the assets are insufficient to pay such bank's debts, he has a right of action for the full amount of such liability or so much thereof as he may elect to collect.

So the agreement of national bank shareholders is to be individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the extent of the amount invested in such shares, and that if necessaay to pay the debts of such bank they will pay the

whole of such liability or such part thereof as the comptroller of the currency shall demand. Such is the contract deducible from the statute itself and the decisions of this Court. Their contract is not, as claimed by the Circuit Court of Appeals for the eighth circuit in *Deweese v. Smith*, 106 Fed. Rep., 438, that they shall be held individually responsible, equally and ratably, and not one for another for all contracts, debts and engagements of such association to the extent of the amount of their stock therein at the par value thereof in addition to the amount invested in such shares and that they "*will pay, at such time and in such amounts, as the comptroller of the currency shall decide to be necessary and shall demand, the debts and obligations of their bank.*"

Said Circuit Court of Appeals without any warrant of law reads into said sections the words in italics and in so doing, as might be expected, misconstrues said sections and gives to them an unwarranted meaning.

The authorities nowhere justify the reading into section 5234 *supra* the words "at such times and in such amounts as the comptroller of the currency shall decide to be necessary," so as to make said section 5234 read as follows:

"Such receiver, under the directions of the comptroller, * * * , may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders at such times and in such amounts as the comptroller of the currency shall decide to be necessary."

The reading of such words into said section is clearly in violation of the rule laid down in *Carroll et al. v. Green et al.*, 92 U. S., 509, that stockholders of a corporation are individually liable according to the plain meaning of the terms employed by the legislature and not otherwise, and that the operation and effect of the statute or the liability of the stockholder, which is measured by it, cannot be extended by implication. *Lowry et al. v. Inman*, 46 N. Y., 119.

Section 5140 R. S., U. S. makes the stock subscription contracts of national bank shareholders payable in installments.

The agreement of national bank shareholders as to payment of the capital stock of their bank by the terms of that section is to pay at least fifty per cent. of the capital stock thereof before commencing business, and the remainder of the capital stock of such bank in installments of at least ten per centum each on the

whole amount of the capital as frequently as one installment, at the end of each succeeding month, from the time such bank shall be authorized, by the comptroller of the currency, to commence business. Section 5140 U. S., R. S. The stockholder's stock subscription contract being payable in installments it can be collected in installments.

The National Banking Act nowhere authorizes the comptroller of the currency to collect the individual liability of national bank shareholders in installments. So in the absence of such authority it cannot be said that national bank shareholders agree to be individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount invested in their shares, at the par value thereof, in addition to the amount invested in such shares and to discharge such responsibility if necessary to pay the debts of such bank at such times as the comptroller of the currency shall name and in such amounts as he shall demand. In other words, the agreement of national bank shareholders is not to discharge their individual liability to pay the debts of their bank in installments on demand of the comptroller.

(*b*) Since the decision in *Kennedy v. Gibson*, *supra*, this Court has understood that the liability of national bank shareholders is one of contract; that such liability is single and indivisible; and that but one assessment, by the comptroller of the currency, to enforce such contract liability, is authorized and but one suit. That this Court entertained such views is clearly shown by the language used therein.

This language was used in that case:

"A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it. If too much be collected, it is provided by statute that any surplus which may remain after satisfying all demands against the association shall be paid over to the stockholders. It is better they should pay more than may prove to be needed than the evils of delay should be encountered."

Why a question of delay, if innumerable assessments could be made? Why any reason for an over-assessment if assessments

can be made from time to time as the necessity for the same becomes apparent? Again, in that case it is said:

"It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only part, how much shall be collected."

The idea conveyed by this language is that these sections authorize the comptroller to make one call or demand, either for the whole of the individual liability of the stockholders or so much thereof as the comptroller shall deem sufficient to pay the bank debts, and if too much be collected the excess should be refunded, and the various comptrollers evidently accepted that as the meaning of the court; for they adopted that practice uniformly until within the last two or three years. No one would understand that the language of that opinion sanctions the very recent contention that the number of suits to enforce the contractual liability of the shareholders is limited only by the discretion of the comptroller.

In 2nd Morawetz on Private Corporations, second edition, at section 882, the learned author, in discussing the liability of shareholders in national banks, says:

"The Act of Congress of 1864 provides that the shareholders in a national bank shall be 'individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares.' When a national bank is insolvent, the extent to which the individual liability of the share holders shall be enforced is fixed by the order of the comptroller of the currency, and such order is conclusive upon the shareholders. If the order is to collect an amount equal to the full par value of the shares, the receiver of the bank must sue each share holder at law for the amount, together with interest from the date of the order."

Cook on Corporations at Section 218 says:

"The double liability of stockholders in national banks is fixed by an order of the comptroller of the currency, and under the national bank act the comptroller of the currency has absolute authority to direct at what time and to what extent the stockholder's statutory liability shall be enforced."

This language clearly implies that the comptroller is authorized to make but one order fixing the individual liability of a national bank shareholder.

(*c*) By the decisions of both federal and state courts it is well settled law that a single contract liability cannot be divided so as to support two actions. If a party has a demand against another he must enforce it in one suit. He cannot sue to recover a part of it and later the remainder. In other words, if a party has a cause of action, he must litigate it and conclude it in one suit. Such is the rule of the common law.

In *Baird v. United States*, 96 U. S., 430, this Court said :

"It is well settled that where a party bringing an action for part only of an entire indivisible demand recovers judgment, he cannot subsequently maintain an action for another part of the same demand. *Warren v. Comings*, 6 Cush., 103. Thus, if there are several sums due under one contract and a suit is brought for a part only, a judgment in that suit will be a bar to another action for the recovery of the residue. Here was a contract by which the government was bound to pay for the engines in accordance with the terms agreed upon. The entire price to be paid was not fixed ; a part was contingent and the amount made to depend upon a variety of circumstances. When the former action was commenced in the court of claims, the whole was due ; although different elements entered into the account, they all depended upon and were embraced in one contract. The judgment, therefore, for the part sued upon is a bar to its action for the residue."

Again, in *Hennequin v. Barney*, 24 Fed. Rep., at p. 582, Judge Wallace said :

"In *Bartelle v. Sehell*, 16 Fed. Rep., 341, it was held by the court that a plaintiff cannot split up a single and entire cause of action and make it the subject of different suits, and that in cases like this the liquidation upon each entry was the foundation of a single and entire cause of action against the collector. Following that decision, the referee correctly ruled that when the plaintiffs brought their action and recovered judgment for a part only of an entire and indivisible demand they estopped themselves from subsequently bringing another action for another part of the same demand."

The rule against splitting of demands is a legal right of defendants.

Lawrence v. United States, 8 Ct. of Claims, 252 ;
Grain v. Aldrich, 38 Cal. 514.

This rule is not a technicality, it is a wholesome rule of justice.

In *United States v. Throckmorton*, 98 U. S., 665, this Court had this to say of this well settled principle of law :

"There are no maxims of law more firmly established or of more value in the administration of justice than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy : *interest rei publicaeut sit finis litium and nemo debet bis vexari pro una et eadem causa.*"

The distinction between demands or rights of action which are single and entire and those which are several and distinct is that the former immediately arise out of one and the same act or contract, and the latter out of different acts and contracts. *Secor v. Sturgis*, 16 N. Y., 548.

In *Secor v. Sturgis*, 16 N. Y. 558, it is said :

"In the case of torts, each trespass or conversion or fraud, gives a right of action, and not a single one, however numerous the items of wrong or damage may be ; in respect to contracts, express or implied, each contract affords one and only one cause of action. The case of a contract containing several stipulations to be performed at different times is no exception ; although an action may be maintained upon each stipulation as it is broken, before the time for the performance of the others, the ground of the action is the stipulation which is in the nature of a second contract."

This principle has been applied in respect to the foreclosure of mortgages ; and it has been held that where a party having a mortgage upon a tract of land, proceeds to foreclose it as to a portion of the tract, it is a waiver of the lien of the mortgage as to the rest of the tract, and he cannot foreclose it as to such residue in a second suit. *Mascarel v. Raffor*, 51 Cal., 242.

In like manner it has been held that where a vendor having a lien for purchase money enforces it as to a portion of the land (*Day v. Preskett*, 40 Ala., 624,) or as to that portion of the money which is due (*Codwise v. Taylor*, 4 Sneed, 346), he thereby exhausts his remedy as to the rest of the land or as to the portion of the purchase money which is not due.

Is the rule in regard to the enforcement of this contractual liability of national bank shareholders different from that in regard to the enforcement of contractual liabilities generally? If so, we ask why? The National Banking Act nowhere expressly provides a different rule.

There is always a presumption against an intent to change the existing law. Black's Interpretation of Laws, Sec. 52.

In Robinson's case, 131 Mass., 376, it was said that the legislature is not to be lightly presumed to have introduced a fundamental change in long established principles of law. See also *Manuel v. Manuel*, 13 O. St., 458.

No special remedy being provided by statute for the enforcement of the individual liability of national bank shareholders, the enforcement thereof is governed by established principles of law. *Pollard v. Bailey*, 20 Wall, 520.

In the absence of words, plainly authorizing the receiver, under the direction of the comptroller, to enforce the contract liability of shareholders of a national bank, by several actions or suits, at such times and in such amounts as the comptroller may decide, how, with what reason and upon what principle of law, can it be said that "the contract of shareholders of a national bank is to discharge their liability for its debts, at such times and in such amounts as the comptroller of the currency shall decide to be necessary and shall appoint" as held by the Circuit Court of Appeals for the Eighth Circuit?

(d) Section 5234 authorizes the enforcement of this contractural liability by suit. The comptroller may, at any time he deems it necessary for the payment of the debts of the association, direct the enforcement of this liability. He has the right to demand payment of an amount equal to the entire par value of the stock. The engagement of the shareholder is to pay that amount if demanded. This liability constitutes a single and indivisible cause of action.

The case of *Harper v. Carroll*, 66 Minn., 487, was a suit to enforce the individual liability of a stockholder under the Minnesota statutes. Section 2501, G. S. 1894, of that State, provides as follows:

"The stockholders in such bank shall be individually liable for an amount equal to double the amount of stock owned by

them for all the debts of such bank; and such individual liability shall continue for one year after the transfer of stock by the stockholder or stockholders."

The proper method of procedure under that statute was considered by the supreme court of that state, and the court there said:

"*They (referring to creditors) are entitled to collect the full balance of their claims, even though it exhausts the statutory double liability of every stockholder to its full limit. Who can say in advance that it will not exhaust such liability to its full limit, and in what other way can this be determined except by the issue of execution? Then one or two propositions must be true. First, the creditors are entitled to successive judgments for successive assessments until the full limit of such statutory liability is exhausted, if such successive assessments and judgments are made necessary by reason of the insolvency of the stockholders; or second, the creditors are entitled to one judgment for the full amount of such statutory liability. We are of the opinion that the latter is the proper method of procedure, and that but one judgment should be rendered, which should cover the utmost possible liability of such stockholder to the creditors.*"

The court held that the proceedings should be in equity, and that execution should be issued subject to the control of the court as necessary; and that successive suits would be improper.

In the matter of The Hollister Bank of Buffalo, 27 N. Y., 393, the question was whether a second assessment was authorized by the act of April 5th, 1849, enacted by the legislature of New York,—the first section of which made stockholders of banking associations individually responsible, equally and ratably, for certain debts to the extent of their respective shares of stock in such association. The court, in holding that a second assessment was not authorized, said *inter alia:*

"Subsequent sections of the act provide for the appointment of a receiver, in case of the insolvency of any banking corporation; for the conversion of its assets into cash; for the payment, in the first place, if necessary, of the bills or billholders; and for a dividend of the surplus, if any, first among the creditors holding debts founded on any liability contracted after the 1st of January, 1850, and if any further surplus remains, then among all other creditors.

"The 14th section provides that if, after the declaration of the first dividend, there shall remain unsatisfied any debts of such corporation or association, contracted since January 1st, 1850, the receiver, without waiting for the payment of such dividend, shall render to a justice of the Supreme Court an account of such debts, and of all his proceedings, together with a list of the stockholders. The matter is then to be referred to a referee, who, after notice to the parties, is to 'apportion the debts of such corporation, contracted after January 1st, 1850, and remaining unsatisfied, among the said stockholders ratably in proportion to their stock,' according to the principles of the act, and to make a report to the court. This report is to be examined by the court. It may be modified, or amended, or referred back. After the report is confirmed, it is to be filed in the office of a county clerk, with the *order* of confirmation, and such order is to be a judgment against each stockholder for the amount assessed, chargeable to him. Provision is made for appeals from orders in such proceedings, and for a new apportionment in case it becomes necessary by reason of the determination upon any such appeal. The money collected upon an apportionment or assessment is to be divided among the creditors, and if any surplus remains after paying the debts, it is to be paid to the stockholders who were assessed, in proportion to the amounts levied upon them.

"The act contains a complete and well digested system for one assessment, without any provision for a second. The contingency of the failure, or inability of a portion of the stockholders to respond to the assessment, although it could hardly have escaped the consideration of the legislature, is not provided for in any way. The apportionment of the debts among the stockholders is directed to be made ratably in proportion to their stock, and a new apportionment or assessment, if made under the direction of the statute, is to correct errors in the first, and not to supply a deficiency in its results. * * *

"As the responsibility of each stockholder is several, the effect of this language is to make each liable for his equal ratable proportion of the debt. The effect of the act may be seen by supposing that all the stockholders of this bank had signed a bond or undertaking to any or all of the creditors by which they severally agreed to be responsible, equally and ratably, in proportion to the amount of their stock, for the debts due by the association, to such creditors. It is, I think, sufficiently plain that such an obligation or agreement would impose upon each of the parties to it a responsibility for a proportionate share of the debts. * *

"This apportionment of liability by the referee, upon the principle of proportion to the stock, when confirmed by the court, becomes the judgment, declaring and enforcing the liability created by the act. There is but one such apportionment and

consequent judgment against each stockholder provided for, and but one contemplated by the act. * * * *

"The act contains no authority for a second assessment or a second application, and I discover no provisions in the law from which it could be inferred that any such subsequent assessment to make good deficiencies in the collection of the first, was contemplated by the framers of the act. * * * *

"Upon the whole, I am of opinion that the liability imposed by this statute upon the stockholders of banking associations, is a several liability for a ratable and equal share of the debts, in proportion to the whole debts and the whole capital stock, and not a liability to each creditor until he is paid, limited only by the amount of stock held by the stockholder, and that the statute gives no authority or jurisdiction to make more than one judgment, the first apportionment and judgment remaining unreversed."

The individual liability, created by the said act of 1849, was substantially the same as that created by sections 5151 R. S., U. S. The extent of that liability was the par value of the stock. Said act of 1849 provided a special remedy for the enforcement of such individual liability, whereas said section 5234, *supra*, provides that such individual liability should be enforced according to law.

The liability created by the act of 1849 was enforceable according to the principles of the act itself, while that created by sections 5151 is enforceable according to general principles of law.

In *Smith v. Huckabee*, 53 Ala. 191, the liability of a shareholder to creditors under statutes of that state was considered. The court said :

"When the legislature imposed on the members of a corporation in the event of dissolution, a personal liability for corporate debts to the extent of their stock, it was a mere increase of security for such debts. It was not intended to exempt from or diminish the liability of the fund which a court of equity regarded as pledged to the payment of corporate debts. To this fund was super-added the personal liability of the members and whatever should be realized therefrom."

The court further says :

"The liability is single, distinct in amount. Can it be split up into as many several causes of action as there may be creditors? That an entire or single cause of action may not be divided or split into several, is an elementary principle."

To hold that the comptroller of the currency may make several assessments and maintain several suits to enforce the individual liability of national bank stockholders, is to hold that the contractual liability of such shareholders may be split and enforced by several assessments and suits, when the National Banking Act nowhere authorizes the splitting of this liability. This is what defendant in error is asking this Court to decide, and is what this Court must decide if this judgment be affirmed. This, we say, cannot be done, and on the well settled principle of law that if a party has a demand or legal obligation to enforce against another party arising *ex contractu*, he cannot split such demand or cause of action, unless authorized by statute to do so. As said in *Hamilton v. Jones*, 125 Ind., 178 :

"Statutes in derogation of the common law are to be strictly construed, and one who seeks to maintain an action, which was within the prohibition of the common law, must be able to point to a statute which in plain and explicit terms authorizes the action to be maintained. A plaintiff who sues on a right of action given by statute must present a case clearly within the statute which creates the right.

(e) It is no answer to our contention to say that the comptroller of the currency may not be able to determine to what extent it is necessary to enforce this personal liability unless he waits until he realizes on the assets of such insolvent bank, and that he ought not to have to wait until that time, as some of the shareholders may become insolvent. If the comptroller is in doubt as to the amount to be collected, let him enforce this liability to the full extent thereof, and refund the balance of the proceeds, if any, to the shareholders, as authorized by statute. Congress fully understood that the comptroller might collect too much, as shown by the enactment of section 5236. If, for any cause, the comptroller of the currency cannot determine the amount to be collected and does not wish to enforce the liability of the shareholders to its full extent, let him proceed in equity, as suggested in *Kennedy v. Gibson*, *supra*, and take interlocutory decrees for contribution from time to time until he realizes enough to pay the debts of such insolvent bank, or until the full amount of such liability is exhausted. It is no answer, therefore, to say that the comptroller may be mistaken as to the amount needed to pay the debts of the insolvent

bank. There is no occasion for such mistake. Let him, if in doubt, either collect the full amount of such liability in an action at law, or proceed in equity. The shareholders cannot complain; for their contract is to pay the par value of their stock on demand of the comptroller.

Where the individual liability of shareholders is enforced in a court of equity, such court has full power to collect such liability by installments, entering a decree *nisi* with time for each shareholder to pay the sum assessed. If the amount collected is insufficient and the liability of such shareholders is not exhausted, such court has full power to make other assessments until the full amount of such liability is exhausted. *Kennedy v. Gibson*, 8 Wall, 498; *Godfrey v. Terry*, 97 U. S., 177.

In 2nd Morawetz on Private Corporations, second edition, at section 902, it is said:

"Where the liability of the shareholders is imposed for the purpose of providing a general fund for the security of creditors, in addition to the company's capital, the proper method of proceeding seems to be to have a receiver appointed to take charge of the fund belonging to the creditors and distribute it ratably among them. The court should properly apportion the liability among the various shareholders within its jurisdiction. A decree *nisi* may be made that each defendant pay the sum assessed against him within a specified time, and that execution issue against those defendants who fail to comply with the decree. If execution against a portion of the defendants should be returned *nulla bona*, a further assessment should be made, until the liability of the defendants has been exhausted, or the plaintiffs have been paid."

A court of equity in a proceeding to enforce the individual liability of national bank shareholders, has power to make successive assessments, and will do so at request of a receiver under direction of the comptroller.

This Court, in *Kennedy v. Gibson*, *supra*, said:

"Where the whole amount is sought to be recovered the proceeding must be at law. Where less is required the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted."

See also on this point the language of Judge Philips in *Deweese v. Smith et al.*, 97 Fed. Rep., 309.

(*f*) Sections 5151 and 5234, *supra*, were enacted in the interest of the creditors of national banks to furnish them additional security. This being so, it was certainly the intention of Congress that there should be a decision or determination by the comptroller at as early a date as practicable as to the necessity of enforcing such liability and as to the extent to which it should be enforced to the end that the creditors might be paid without unnecessary delay and not sustain loss which might result from delay in enforcing such liability. And as if to protect such creditors to the fullest possible extent in these respects, the comptroller was authorized to enforce such individual liability to its full extent, if it became necessary to enforce such liability to pay the debts of such bank. To authorize the comptroller of the currency to enforce such liability to its full extent, he simply has to decide that the assets of such bank are insufficient to pay its debts, contracts and obligations. In determining that it is necessary to enforce such liability to pay such debts, he is not required, by these sections or the decisions of this Court, to further determine the exact amount necessary to pay them. If he were, there was no occasion for the enactment of Section 5236.

So, we confidently submit that the obligation of national bank shareholders is to pay the par value of their stock on demand of the comproller, if the assets of their bank are insufficient to pay its debts, contracts and obligations, no matter how little the deficiency may be. Such a construction of these sections affords the creditors of such bank the fullest protection, such as was the manifest intention of Congress to give them, and such construction is perfectly consistent with the rules of construction hereinbefore invoked by us.

It has been suggested that the enforcement to the full extent of this individual liability of national bank shareholders, or to a greater extent than thought to be necessary by the comptroller, would be a hardship on such shareholders. A sufficient answer to this suggestion is that Congress was looking after the interests of national bank creditors when these sections were enacted into law, and not those of shareholders.

(*g*) The term "assessment" is nowhere used in this statute.

The terms, "calls and assessments" are sometimes used indiscriminately. The term "assessment" strictly applies only to amounts levied beyond the par value of stock. The rule is now general that corporations have no implied power to make such levies, and even when the power is expressly conferred it will receive a strict construction. Am. & Eng. Encyp. of Law, Vol. 23, p. 817; Morawitz on Corporations, Sec. 131.

In 2nd Beach's Private Corporations at section 590, it is said:

"The word 'assessment,' when used in reference to members of companies having capital stock, more properly refers to amounts levied upon shareholders after their subscriptions have been fully paid. The power to levy assessments, using the word in this, its proper sense, is wholly statutory, and will not be lightly inferred from the language of a statute or charter."

In support of this text are cited Price's Appeal, 106 Pa. St., 421; *Upton v. Tribilcock*, 91 U. S. 45; *Sagory v. Dubois*, 3 Sandf. Ch. (N. Y.) 466.

In 23 Am. & Eng. Encyp. of Law, p. 803, it is said:

"The terms 'calls and assessments' are often used indiscriminately to denote the exercise by the corporation of its right to declare due and to collect subscriptions or a part thereof. The word 'calls,' however, has other meanings; while the term 'assessment' is said to refer more properly to 'amounts levied upon shareholders after their subscriptions have been fully paid.'"

The power to levy or make assessments upon stockholders after their subscriptions are fully paid, we have seen is wholly statutory, and when conferred by statute, such statute is strictly construed.

Section 5234, *supra*, simply authorizes the comptroller to enforce the individual liability of shareholders of a national bank, if necessary to pay the debts of such bank. The comptroller is therefore plainly authorized to decide as to the necessity of enforcing such liability and as to the time when the same is to be enforced, and fix the amount to be collected. In short, there is to be a decision by the comptroller as to these matters and then a demand or requisition by him followed by one suit at law or in equity as circumstances require. It is this decision which has been termed an assessment. The comptroller is nowhere ex-

pressly authorized to enforce such liability by several decisions and suits. He is simply authorized to enforce the individual liability of national bank stockholders according to law, which means the application of the appropriate remedy according to the course of legal procedure. If this statute authorizes but one suit or proceeding to enforce this liability, as we contend, it follows as night the day that there can be but one decision by the comptroller as to the time, necessity and extent of enforcing this individual liability, and, therefore, but one assessment, as this statute certainly does not authorize an assessment which could not be enforced by suit.

IV.

For Thirty-three Years Comptrollers of the Currency Charged with the Execution of Sections 5151 and 5234 R. S., U. S., Construed these Sections to Authorize But One Assessment.

The comptrollers of the currency for thirty-three years understood that Sections 5151 and 5234, *supra*, authorized them to make but one assessment.

If these sections do not plainly authorize several assessments or decisions by the comptroller, we submit the construction placed thereon by the comptrollers of the currency for the last thirty years, and acquiesced in for the same length of time by Congress and acted upon by national bank shareholders, should not now be disturbed. To justify this Court in setting aside this practical construction of these sections, it should be convinced by most cogent and persuasive reasons that such practical construction is *clearly erroneous.*

The report of the comptroller of the currency for 1898, at p. XXXVI of Vol. 1, reads as follows:

"The practice of this office heretofore has been when an assessment on stockholders is once decided upon as the proper one to cover a deficiency in the assets of an insolvent bank and to

reimburse depositors, to regard such levy as irrevocable and unchangeable, notwithstanding further developments in the administration of a trust, may demonstrate error in the assessment."

And this Court in making up its opinion of the law of this case will take notice of this statement.

In *Davidson v. Gibbon*, 56 Fed. Rep., 446, the Circuit Court of Appeals, per CALDWELL, J., said:

"The court in making up its opinion of the law on the case is not limited in its researches to legal literature. It may consult works on collateral sciences or art or history touching the topic on trial, and may appeal to the public archives for this purpose. *Wheat, on Evidence*, Sections 282 336; *Brown v. Piper*, 91 U. S., 42; *U. S. v. Teachmaker*, 22 How., 392; *Kirby v. Lewis*, 39 Fed. Rep., 66."

In *Black on Interpretation of Laws*, p. 217, it is said:

"The existence and nature of such a usage is a matter of law. The court will take judicial notice thereof or will inform itself by any proper and available means. Interested parties are neither required nor permitted to prove it as a fact."

Another principle of construction in view of this practice, to be here invoked in arriving at the true meaning of Sections 5151 and 5234, is the practical construction put thereon soon after enactment. This construction, after the lapse of time without change thereof by legislation or judicial decision, has been declared by the courts to be generally the best construction.

As said by Chief Justice MARSHALL, in *Cohens v. Virginia*, 6 Wheaton, 418:

"Great weight has always been attached, and very rightly attached, to contemporaneous exposition."

In *United States v. Moore*, 95 U. S., 760, the court said:

"The construction given to the statute by those charged with the duty of executing it ought not to be overruled without cogent reasons."

In *U. S. v. Johnston*, 124 U. S., p. 253, the court said:

"In view of the foregoing facts the case comes fairly within the rule often announced by this court that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight

and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

In *U. S. v. Philbrick*, 120 U. S., at p. 59, it is said :

"A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight, and since it is not clear that that construction was erroneous, it ought not to be overruled."

These sections were enacted in 1864, and the comptrollers of the currency for thirty-three years, some of whom were eminent lawyers, have held without exception that there could be but one assessment on the shareholders of an insolvent bank to pay the debts of such bank. Can it be that all of these comptrollers have misconstrued these sections? Is the judgment of the comptroller, who made the assessment in question, as to the meaning of the law better than that of all his predecessors in office and the legal advisers of the United States by whom the comptrollers of the currency were evidently advised and upon whose advice they acted? Congress has been in session time and again since these sections were first interpreted by those whose duty it was to execute the provisions thereof, and Congress has taken no action to amend these sections so as to authorize a second assessment on the shareholders of an insolvent national bank. On the contrary, Congress has acquiesced in the construction placed on these sections by the comptrollers of the currency for the last thirty-three years. The action of the present comptroller in making the assessment on which suit is brought against this defendant seems unwarranted to say the least, in view of the plain meaning of these sections and in view of the practical construction of all his predecessors in office and the long acquiescence of Congress therein.

Can this Court imagine a single cogent and persuasive reason why the practical construction placed on these sections of this statute and so long acquiesced in by Congress should be disturbed at this late date? These sections, as construed by this Court in *Kennedy v. Gibson*, *supra*, give the comptroller of the currency ample power to protect the interests of creditors of national banks in whose interests they were enacted.

We therefore submit that the construction placed upon these sections for the last thirty-three years is right and should not be

disturbed or overruled by the courts at this late day. In the language of this Court in *Robertson v. Downing*, 127 U. S., 613:

"This construction of the department has been followed for many years, without any attempt of Congress to change it, and without any attempt, so far as we are advised, of any department of the government to question the construction except in the present instance. The regulations of a department of the government is not, of course, to control the construction of an act of Congress when its meaning is plain, but when there has been a long acquiesence in a regulation, and by it rights of third parties, for many years, have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons."

V.

Recent Decisions on Question Here Presented for Decision.

The question under discussion here was first presented in *Aldrich v. Yates*, 97 Fed. Rep., 78, where Judge Evans of the United States Circuit Court for the district of Kentucky, on June 28, 1899, held that the comptroller of the currency was authorized to make successive assessments on national bank shareholders. This decision bears evidence of being hastily considered and is supported by neither reason nor authority. In deciding the question which this record presents he said:

"The question, then, remains, has the comptroller of the currency the power to make a second assessment in any event? The ultimate liability of the shareholder in such cases is for the full amount of the par value of the stock (section 5151), under the statutory conditions, if they are found by the comptroller to exist. A mistake of that officer in making an estimate of the amount of a needed assessment cannot be held to release the shareholder from the full statutory liability. A mistake of such a character would be natural, if not inevitable, in many instances, in view of the uncertain value of assets; and the indisposition in the first instance to make an assessment unnecessarily large may well excuse its not being done, when there is certainly no statutory provision prohibiting, in terms or by necessary implication, further assessments, if the necessity exists. In practice, second assessments have frequently been made. The court is of opinion that such a course is within the power of the comptroller,

in the exercise of his duty to see that the liability of the stockholder is sufficiently enforced to pay the debts of the bank, and that practice has been recognized as proper by the Supreme Court. See *U. S. v. Knox*, 102 U. S., 422."

Judge Evans, it will be observed, states that in practice two assessments have frequently been made. Just the contrary of this statement, we have seen, is true and the practice in this regard we have just seen is an all important consideration in a decision of this case. It will also be noticed that the contentions here made seem never to have been urged or considered by Judge Evans in his opinion. Judge Evans completely overlooked the principles of law applicable in a decision in that case and reached the conclusion he did, partly at least, upon the assumption of the existence of a fact which did not exist. For these reasons we think we are justified in saying that the Evans' opinion is not well considered.

The next case in which this question was presented is *Deweese v. Smith*, 97 Fed. Rep. 309, decided October 19, 1899, by the United States Circuit Court for the Western District of Missouri. There the power of the comptroller of the currency to make successive assessments was denied in a well considered opinion. By a reading thereof it will be seen that it is carefully considered and supported by both reason and authorty and is characterized by that regard for well settled principles of law which should characterize every opinion of a court.

In *Studebaker v. Perry, Receiver, supra*, the Circuit Court of Appeals for the seventh Circuit did not attempt to meet and dispose of the contentions here made, but dogmatically held that the comptroller of the currency was authorized by law to make successive assessments and expressed its reasons therefor in this language :

"Indeed, the contention here is that merely by making one assessment for less than the entire amount of the stock the comptroller deprives himself of the power to make another, and that no more than one assessment can be collected, unless the shareholders shall refuse to pay the first, and the receiver shall choose to proceed in equity to collect it, and so give the court opportunity to hold the case 'for further action.' See also *Bank v. Case*, 131 U. S. Append. cxliv., 23 L. Ed. 961. The dominant purpose of the parts of the statute touching this ques-

tion is that the shareholders of an insolvent national bank shall be liable for its debts 'to the extent of the amount of their stock therein,' and rules of construction are not to be invoked in a way to defeat that purpose. Under the direction of the comptroller the receiver is authorized to enforce the shareholder's liability; but the power to enforce does not include a power to cut off or limit, and by no proper application of general rules of construction can the statute be so read as to permit the failure of its main design. In the case of *Aldrich v. Campbell*, 38 C., C. A. 347, 97 Fed. 663, the suit was to enforce a second assessment, the first having been fully paid, and the power of the comptroller to make successive assessments, though not denied, was considered and affirmed. In *Aldrich v. Yates*, (C. C.), 95 Fed., 78, the power, though denied, was affirmed by the circuit court for the district of Kentucky, and like rulings in unreported cases have been made at circuit in Indiana and elsewhere.

"If the statute were one whose meaning could be sought in contemporary construction, there is nothing in the practice of the comptrollers to affect our conclusion. The comptrollers have had the power to make assessments, either for the entire amount of stock or less, and the evidence is abundant in the reported cases of the exercise of the power in both ways. Of the effect of proceeding in one way or the other, the question was not, and in the nature of things, could not have been, for their decision, and it does not appear that any of them ever assumed to decide it. The judgment is affirmed."

The statement that the evidence is abundant in the reported cases of the comptrollers of the currency making successive assessments is certainly inaccurate, if not reckless; for in the report of the comptroller of the currency for 1898, at page XXXVI of Vol. 1, we find this language:

"The practice of this office heretofore has been when an assessment on stockholders is once decided upon as the proper one to cover a deficiency in the assets of an insolvent bank and to reimburse the depositors, to regard such levy as irrevocable and unchangeable, notwithstanding further developments in the administration of the trust, may demonstrate error in the assessments."

In *Dewecse v Smith*, 106 Fed. Rep., 438, the Circuit Court of Appeals for the eighth circuit met and disposed of each contention here made, against us, but to do so to its satisfaction that court was forced to place a construction upon Sections 5151 and 5234, *supra*, which, in our judgment, was unwarranted, and which we believe we have demonstrated to be so. If the con-

struction, placed upon those sections by that court is correct, its decision may be sound. That court, in the course of its opinion, said :

"The agreement of the shareholder with the bank and its creditors thus becomes a contract that to an amount not exceeding the par value of his shares of stock and not exceeding his equal and ratable proportion, he will pay, at such times and in such amounts as the comptroller of the currency shall decide to be necessary and shall demand, the debts and obligations of his bank."

And later, in the opinion, said :

"The contract of the shareholders of a national bank is to discharge their liability for its debts at such times and in such amounts as the comptroller of the currency shall decide to be necessary and shall appoint."

To successfully dispose of our contention against successive assessments it was necessary to place just such a construction on those sections as that court did.

As no two of the decisions holding that the comptroller of the currency is authorized to make successive assessments agree as to the reasons given in support thereof, the correctness of such decisions may well be questioned.

Defendant in error in the lower courts relied on *Aldrich v. Campbell*, 97 Fed., 663. Upon examination it will be found that the point presented by this record and here discussed was in no way involved or controverted in that case.

The facts in *Aldrich v. Campbell*, were these :

J. Frank Aldrich, receiver of the Tacoma National Bank, commenced an action at law to recover of Louis D. Campbell, a shareholder of said bank, a second assessment of $17.00 per share on his shares of stock in said bank. Thereupon, Campbell brought a bill in equity to enjoin Receiver Aldrich from further prosecuting said action at law, stating the pendency of said action at law, and alleging that the total indebtedness of said bank at the time it suspended payment did not exceed $222,362.34 ; that the total amount collected by the receiver from the assets of said bank was $139,000.00 ; that the total amount of the assessment levied by the comptroller of the currency on the shareholders was $130,000.00 ; and that the sum of these two amounts, $269,000.00,

was at least $46,637.66 in excess of the total indebtedness of said bank at the time it suspended payment, and largely in excess of said indebtedness, plus the interest thereon, to the time of the first assessment of August 6th, 1895.

He further alleged that he was debarred from interposing these facts as a defense to the action at law, and could not obtain full and complete justice in said action; that the comptroller of the currency, by said assessment of August 6th, 1895, had collected from said Campbell $1,500 in excess of the amount lawfully assessable against him as a stockholder in said bank; wherefore he prayed that said comptroller and receiver be decreed to repay him the sum of $1,500 and be enjoined from further prosecuting the said action at law. Receiver Aldrich, of said bank, demurred to the bill on the ground of want of jurisdiction, for the reason that the amount in controversy was less than two thousand dollars; and on the further ground that the complainant had not in and by his bill stated such a cause as entitled him in a court of equity to any discovery from the respondent, or to any relief against him as to any of the matters contained therein. The trial court overruled the demurrer and entered an interlocutory order restraining said receiver until the hearing and determination of said cause before proceeding further against said Campbell in the action at law, pending in said court. And it was from those orders an appeal was taken to the Circuit Court of Appeals.

The court, after disposing of the jurisdictional question raised in that case, said:

"The real controversy in the case at bar arises, however, on the second ground of demurrer, which presents this question: Does the bill state facts entitling complainants (appellee) to any relief or discovery in equity against said receiver? The bill alleges the total indebtedness of the bank at the time of the suspension of payment; the amount collected by the receiver from the assets, and upon the first assessment levied by the comptroller; that these collections were in excess of the total indebtedness of the bank, including interest; and that the second assessment levied by the comptroller was for this reason unnecessary and unlawful."

And the court states the appellee's contention in this language:

"The appellee in the present case dose not deny the authority of the comptroller as declared by these decisions"—meaning

Kennedy v. Gibson, 8 Wall., 498, and *Casey v. Galli*, 94 U. S., 673—"but he seeks to avoid the effect of such authority by contending that, while in an action on the part of a receiver of a national bank to recover an assessment, no defense can be interposed by the stockholder to such an action, however excessive or wrongful the assessment may be, nevertheless the stockholder in such a case may restrain the receiver by a bill in equity to enjoin such action; and in support of this contention he relies upon an observation of Mr. Justice Swayne in delivering the opinion of the Supreme Court of the United States in the case of *U. S. v. Knox*, 102 U. S., 422."

The court, in disposing of this contention of appellee, among other things, said:

"Whether that assessment — meaning the first assessment — was sufficient is a question which the law has placed wholly within the power of the comptroller to determine, and without some showing of fraud, accident or mistake, it must be deemed by the court to be insufficient and the necessity of a second assessment conclusive. The obligations of a stockholder of the bank, as well as the power of the comptroller, representing the rights of the creditors of the bank to enforce such obligations, are defined by positive rules; and the point at which the stockholder can deny his liability ceases, and the power of the comptroller to enforce it commences, is clearly established. These rules cannot be countravened or varied by the interposition of a court of equity.
* * *

It follows that the bill does not state facts sufficient to entitle the complainant to any relief in equity and the demurrer should have been sustained. There is still the further objection to the bill that it is a collateral attack upon a judicial or quasi-judicial decision, and under the principles announced by this court in *Brown v. Tillinghast*, 35 C. C. A., 323, 93 Fed., 326 — cannot be maintained."

In that case it was conceded by both parties that the comptroller of the currency had the power and authority, under sections 5151 and 5234, to make a second assessment. The contention of shareholder Campbell was, that the collections already made by the receiver were in excess of the total indebtedness of the bank, including interest, and for that reason the receiver should be restrained from making a second assessment upon the shareholders of said insolvent bank. So it cannot be said that the point raised in the case at bar was raised and decided in *Aldrich v. Campbell*, *supra*.

The question here is one of power of the comptroller under the statute to make a second assessment to enforce the individual liability of national bank shareholders and this question is to be determined by a construction of sections 5151 and 5234.

We respectfully submit that these sections authorize the comptroller of the currency to make only one assessment or decision to enforce the individual liability of national bank shareholders and that the judgment herein should be reversed.

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